



DATE: 20 November 1987
CASE NO. 87-INA-583

IN THE MATTER OF

VIVA OF CALIFORNIA

Employer

on behalf of

TAEK HOON KIM

Alien

BEFORE: Litt, Chief Judge; Vittone, Associate Chief Judge; and Brenner, DeGregorio, Fath, Levin, and Tureck, Administrative Law Judges

DECISION AND ORDER

This proceeding was initiated by the above named Employer who requested review, pursuant to 20 C.F.R. Section 656.26, from the determination of a Certifying Officer of the U.S. Department of Labor denying an application for labor certification which the Employer submitted on behalf of the above named Alien, pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182 (a)(14) [hereinafter, the Act.]

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work (1) there are not sufficient workers in the United States who are able, willing, qualified, and available for employment and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

The procedures governing labor certification are set forth at 20 C.F.R. Part 656. An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. §656.21 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File [hereinafter, AF], and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

Viva of California is an importer of a variety of bags from Korea. Among these products are school, duffle, garment, and travel bags. The company works directly with its suppliers in Korea, and much of its communication by letter and telephone is in the Korean language. However, documents submitted in support of the application for labor certification show that invoices for merchandise shipped to it from Korea, packing slips, and customs invoices are in the English language.

Viva seeks a labor certification for an alien to fill a position described as "'Clerk/import-gen. office duties". These duties consist of calculating tariffs, duties, and prices with conversions. The applicant must be able to prepare correspondence and proposals, speak Korean fluently, and type at a speed of 45 words per minute. The employer requires one year of experience in the work. The job pays \$1,475.00 for a forty hour week.

The alien is a citizen of Korea presently living and working in Saudi Arabia. Since 1976, he has worked in international trade for Korean companies dealing in construction materials. He states that he has been responsible for analyzing profit and loss on overseas operations. The alien has a bachelor degree in economics from Sung Kyun Kwan University in Korea.

In response to the required advertisements, three referrals were sent to the employer. Each of the applicants had the language, typing, and clerical skills requested by the employer. On contacting these applicants, the employer found that they were not available for the job: one thought she was applying for a job with the state of California, and was not interested in working for a private employer; another said he was going into business for himself, and was not interested in the job; from the husband of the third the employer learned that the applicant was having a baby and would be staying home after the birth.

In response to questionnaires sent to them by the Department of Labor, one of the applicants stated that the employer contacted him two to three months after he had sent in his resume, and by that time he was in his own business, and another said the employer did not contact him.

Notice of Findings

The Certifying Officer denied the labor certification on grounds: the employer waited two to three months before contacting an applicant, and, therefore, did not recruit in good faith; the U.S. workers were rejected by the employer for other than lawful job-related reasons; the applicant whom the employer said was not available because she wanted to stay home with her baby reported she was never contacted, and is still looking for a job.

In rebuttal of the Notice of Findings, the employer stated that none of the applicants were available and interested in the position, and requested labor certification.

In its request for review, the employer argues that the applicants were not available. In addition, it states that the delay in contacting the applicants was due in part to the failure of the Labor Department to send the resumes until a month and one-half after the recruitment period began.

Conclusion

The Certifying Officer was correct in his assessment of the recruiting efforts of the employer: they were not made in good faith. Contacts with the applicants were not only unreasonably delayed, but they were made in token compliance with the regulations. All of the applicants were qualified, but none were offered an interview. It appears that the employer placed the the burden of follow-up on the applicant instead of "intensively" recruiting as required by the regulations. After a telephone conversation with the employer, one of the applicants felt that there really was not a job offer.

The employer has not carried its burden of proof. If anything is proved it is that there are U.S. workers qualified, available, and willing to take the job.

The finding of the Certifying must be affirmed.

ORDER

It is ADJUDGED and ORDERED that the Certifying Officer's denial of a labor certification in this case be, and is hereby, affirmed.

GEORGE A. FATH
Administrative Law Judge